

IN THE
Supreme Court of the United States

October Term, 1977.

No.

77-308

Supreme Court, U. S.

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Philadelphia Newspapers, Inc., The Associated Press, Central States Publishing, Inc., The Pennsylvania Newspaper Publishers Association, The Pennsylvania Society of Newspaper Editors, and The Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter, *Appellants,*

v.

The Honorable Domenic D. Jerome, Judge of the Court of Common Pleas of Delaware County, Pennsylvania

and

Equitable Publishing Company, Inc., The Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter, The Pennsylvania Newspaper Publishers Association and The Pennsylvania Society of Newspaper Editors, *Appellants,*

v.

The Honorable Lawrence A. Brown, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania

and

Montgomery Publishing Company, *Appellant,*

v.

The Honorable Lawrence A. Brown, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania

and

Equitable Publishing Company, Inc., The Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter, The Pennsylvania Newspaper Publishers Association, and The Pennsylvania Society of Newspaper Editors, *Appellants,*

v.

The Honorable Robert W. Honeyman, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania

and

Montgomery Publishing Company, *Appellant,*

v.

The Honorable Robert W. Honeyman, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania.

Appeal From the Judgments of the Supreme Court of Pennsylvania.

JURISDICTIONAL STATEMENT.

Of Counsel:

ARTHUR E. NEWBOLD, IV,
DECHERT, PRICE & RHOADS,
3400 Centre Square West,
1500 Market Street,
Philadelphia, Pennsylvania. 19102

ROBERTA S. STAATS,
MORGAN, LEWIS & BOCKIUS,
The Fidelity Building,
123 South Broad Street,
Philadelphia, Pennsylvania. 19109

DAVID H. MARION,
SAMUEL E. KLEIN,
KOHN, SAVETT, MARION & GRAF, P. C.,
1214 IVB Building,
1700 Market Street,
Philadelphia, Pennsylvania. 19103
(215) 665-9900

Attorneys for Appellants.

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REFERENCE TO OPINIONS BELOW.

The Court below rendered no opinions.

The Judgments sought to be reviewed were entered by the Supreme Court of Pennsylvania. Appellants were advised by the Supreme Court of Pennsylvania that it had endorsed upon their Petitions for Writ of Mandamus and Prohibition the following Orders:

“Denied
s/ By the Court”

Letters from the Supreme Court of Pennsylvania to Appellants giving notice of entry of the aforesaid Orders are appended hereto as Exhibits 1 through 5.

STATEMENT OF GROUNDS FOR JURISDICTION.

This Court has jurisdiction over these appeals, pursuant to 28 U. S. C. § 1257(2) in that these appeals are taken from Orders of the Supreme Court of Pennsylvania upholding the validity of Pennsylvania Rules of Criminal Procedure against claims of repugnancy to the Constitution of the United States, specifically, the First, Fifth, Sixth and Fourteenth Amendments thereto. The Pennsylvania Rules of Criminal Procedure are the equivalent of statutory enactments by the Legislature, have the force and effect of law, and all laws inconsistent with the Rules are deemed suspended. Constitution of the Commonwealth of Pennsylvania, Article V, § 10(c).

The proceedings below were brought to gain access by the press and public to pretrial suppression hearings in three separate criminal proceedings. In *Philadelphia Newspapers, Inc., et al. v. The Honorable Domenic D. Jerome*, the Pennsylvania Supreme Court on March 23, 1977 denied Petitions seeking vacation of the trial court's orders closing pretrial hearings and sealing and impounding all papers, documents and records filed in the case of *Commonwealth of Pennsylvania v. W. A. "Tony" Boyle*, Court of Common Pleas of Delaware County, Pennsylvania, Nos. 650A, 650B and 650C. Similar orders were entered on June 20, 1977 in *Equitable Publishing Company, et al. v. The Honorable Robert W. Honeyman*; *Montgomery Publishing Company v. The Honorable Robert W. Honeyman*; *Equitable Publishing Company, et al. v. The Honorable Lawrence A. Brown*; and *Montgomery Publishing Company v. The Honorable Lawrence A. Brown*.

Notices of Appeal were filed on August 5, 1977 in the Supreme Court of Pennsylvania. The Notices of Appeal

are appended hereto as Exhibits 6 through 10. This single jurisdictional statement is filed on behalf of five separate appeals from the Orders of the Supreme Court of Pennsylvania involving identical or closely related questions, in accordance with Rule 15(3) of this Court.

The text of the Pennsylvania Rules of Criminal Procedure whose validity is challenged by this appeal is as follows:

"Rule 323. Suppression of Evidence

(a) The defendant or his attorney may make application to the court to suppress any evidence alleged to have been obtained in violation of the defendant's constitutional rights.

(b) Unless the opportunity did not previously exist, or the interests of justice otherwise require, such application shall be made only after a case has been returned to court and not later than ten days before the beginning of the trial session in which the case is listed for trial, except that in any judicial district having continuous trial sessions said application shall be filed not later than ten days before the day the case is listed for trial. If timely application is not made hereunder, the issue of the admissibility of such evidence shall be deemed to be waived.

(c) Such application shall be made to the court of the county in which the prosecution is pending.

(d) The application shall state specifically the evidence sought to be suppressed, the specific constitutional grounds rendering the evidence inadmissible, and shall state with particularity the facts and events in support thereof.

(e) Upon the filing of such application, a judge of the court shall fix a time for hearing, which may be

either prior to or at trial, and which shall afford the attorney for the Commonwealth a reasonable opportunity for investigation and answer, and shall enter such interim order as may be appropriate in the interests of justice and the expeditious disposition of criminal cases.

(f) *The hearing, either before or at trial, shall be held in open court unless defendant, by his counsel, moves that it be held in the presence of only the defendant, counsel for the parties, court officers and necessary witnesses. In any event, the hearing shall be held outside the hearing and presence of the jury. In all cases the court may make such order concerning publicity of the proceedings as it deems appropriate under Rules 326 and 327.*

(g) *A record shall be made of all evidence adduced at the hearing. The clerk of court shall impound the record and the nature and purpose of the hearing and the order disposing of the application shall not be disclosed by anyone to anyone except to the defendant and counsel for the parties. The record shall remain thus impounded unless the interests of justice require its disclosure.*

(h) The Commonwealth shall have the burden of going forward with the evidence and of establishing the admissibility of the challenged evidence. The defendant may testify at such hearing, and, if he does so, he does not thereby waive his right to remain silent during trial.

(i) At the conclusion of the hearing, the judge shall enter on the record a statement of findings of fact and conclusions of law as to whether the evi-

dence was obtained in violation of the defendant's constitutional rights, and shall make an order granting or denying the relief sought.

(j) If the court determines that the evidence is admissible, such determination shall be final, conclusive and binding at trial, except upon a showing of evidence which was theretofore unavailable, but nothing herein shall prevent a defendant from opposing such evidence at trial upon any ground except its admissibility." (emphasis added).

"Rule 326. Special Orders Governing Widely-Publicized or Sensational Cases

In a widely-publicized or sensational case, the Court, on motion of either party or on its own motion, may issue a special order governing such matters as extrajudicial statements by parties and witnesses likely to interfere with the rights of the accused to a fair trial by an impartial jury, the seating and conduct in the courtroom of spectators and news media representatives, the management and sequestration of jurors and witnesses, and any other matters which the Court may deem appropriate for inclusion in such an order. In such cases it may be appropriate for the court to consult with representatives of the news media concerning the issuance of a special order."

19 Pa. S. (1977) Rules Supp.)

Pursuant to the provisions of 28 U. S. C. § 2103, appellants ask the Court to regard this Jurisdictional Statement as a Petition for Writ of Certiorari in the event it is determined that this appeal has been improvidently taken.

QUESTIONS PRESENTED.

1. ^{Are} Whether the provisions of Pennsylvania Rules of Criminal Procedure 323(f) and (g), which permit the closing of a pretrial hearing at the request of a criminal defendant and mandate the impoundment of all records of the hearing, ~~are~~ void on their face because they deny, in violation of the First, Sixth and Fourteenth Amendments, the public's right to be contemporaneously informed about court proceedings, such denial being effected without hearing and with no showing as to (a) the nature and extent of pretrial news coverage and the potential for prejudice to the criminal defendant, and (b) whether other measures could protect the defendant's right to a fair trial without obliteration of the rights of the press and public?

^{Are} (2.) Whether Pennsylvania Rules of Criminal Procedure 323 and 326, pursuant to which the trial courts entered orders which (i) closed their courtroom, (ii) sealed official court records, and (iii) prohibited parties, witnesses, attorneys and others from communicating with the press, thus totally prohibiting, with no hearing or showing of potential prejudice, publication of any news concerning important criminal trials and pre-trial proceedings, ~~are~~ void as applied in that they effect impermissible prior restraints on publication in violation of the First and Fourteenth Amendments.

STATEMENT OF THE CASE.

I. Philadelphia Newspapers, Inc., et al.¹ v. The Honorable Domenic D. Jerome, Judge of the Court of Common Pleas of Delaware County.

This action arose from proceedings in the re-trial of W. A. "Tony" Boyle, former President of the United Mine Workers of America, in the Court of Common Pleas of Delaware County, Pennsylvania. Mr. Boyle's first trial, which resulted in a conviction for the execution-style slayings of a rival for union office and members of his family, received nationwide attention. The conviction was reversed by the Pennsylvania Supreme Court,² and a new trial ordered. On March 28, 1977, during pretrial proceedings on remand, the trial court entered a comprehensive order prohibiting parties, attorneys and their associates, all public officials and others from, *inter alia*, releasing extrajudicial statements relating to the case, commenting upon any evidence and disseminating any documents the admissibility of which may have to be determined by the Court. On May 2, 1977, "all papers,

1. The parties below were:

Philadelphia Newspapers, Inc., publisher of *The Philadelphia Inquirer* and *Philadelphia Daily News*, newspapers of general circulation throughout Pennsylvania and the Delaware Valley region; The Associated Press, a New York non-profit association which is the largest gatherer of news in the United States; Central States Publishing, Inc., publisher of *The Delaware County Times* of Delaware County, Pennsylvania; The Pennsylvania Newspaper Publishers Association; The Pennsylvania Society of Newspaper Editors; and The Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter, which are professional associations of Pennsylvania journalists.

2. *Commonwealth v. Boyle*, 386 A. 2d 661 (Pa. 1977).

documents and records filed and to be filed in this matter" were ordered sealed and impounded.³ Also on May 2, 1977, the trial court orally ordered the courtroom cleared of all representatives of the press and public and thereafter commenced hearings on defense suppression motions behind closed doors. All of these orders were entered at the request of the defense and with the concurrence of the Commonwealth. No hearing was held, no finding of potential prejudice was made, and no alternative and less restrictive methods of insuring a fair and impartial trial were considered.

On May 4, 1977, appellants filed a Petition to Vacate the trial court's orders. The trial court signed a Rule, returnable on May 9, 1977, *after* the scheduled completion date of the suppression hearings. Appellants thereupon filed with the Supreme Court of Pennsylvania, on May 4, 1977, Petitions for Writ of Mandamus and Prohibition and for Plenary Jurisdiction.⁴ In these Petitions, appellants asserted that the trial court's orders infringed upon free speech and violated the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution by spreading a pervasive cloak of secrecy over an important criminal trial with no showing of potential prejudice to the defendant's right to a fair trial.

On May 9, 1977, the trial court heard argument on the Petition to Vacate. Appellants contended specifically that the Pennsylvania Rules of Criminal Procedure were un-

3. Because of the impoundment order, the orders themselves were not made available to appellants until released by the trial court for the purpose of this litigation.

4. The Petition for Plenary Jurisdiction was filed pursuant to § 205 of Pennsylvania's Appellate Court Jurisdiction Act, 17 Pa. S. § 211.205, which provides for the assumption by the Supreme Court of plenary jurisdiction over matters of immediate public importance with authority to enter orders to "cause right and justice to be done."

constitutional (Transcript of Hearing Before The Honorable Domenic D. Jerome in *Commonwealth v. W. A. "Tony" Boyle*, May 9, 1977, p. 15). Appellants also asserted that prior to the entry of orders which closed the courtroom, sealed all records and imposed a "gag", a hearing should have been held to determine the propriety of the orders under the circumstances and to ascertain whether "more narrow orders could be drawn which might protect the rights of the defendant without unduly infringing upon the rights of the press" (*Id.* at pp. 9-10). The trial judge ruled that he was obligated to accord *prima facie* validity to the Pennsylvania Supreme Court's Rules, and denied the Petition to Vacate.

On May 23, 1977, the Pennsylvania Supreme Court denied both Petitions for Mandamus and for Plenary Jurisdiction, thus rejecting appellants' claims as to the constitutional infirmity of the Pennsylvania Rules of Criminal Procedure.

II. Montgomery County Cases.

Equitable Publishing Company, Inc., et al.⁵ v. The Honorable Robert W. Honeyman; and Equitable Publishing Company, Inc., et al. v. The Honorable Lawrence A. Brown.

Montgomery Publishing Company⁶ v. The Honorable Robert W. Honeyman; and Montgomery Publishing Company v. The Honorable Lawrence A. Brown.

These actions were filed in connection with two separate criminal trials pending in the Court of Common Pleas of Montgomery County, Pennsylvania: *Commonwealth v. John Palmer*, No. 149-77 and *Commonwealth v. Larry J. Phillips*, No. 5060-76. The defendant in the *Palmer* case was a policeman charged with the kidnap-murder of a young girl. The defendant in *Phillips* was accused of murdering a Montgomery County policeman. In both cases, the trial courts entered orders, pursuant to the Pennsylvania Rules of Criminal Procedure, which closed the courtrooms to the press and public during pretrial hearings, sealed and impounded all records of the hearings, and prohibited parties, attorneys, police officers, prospective

5. The parties below were:

Equitable Publishing Company, Inc., publisher of *The North Penn Reporter* of Lansdale, Montgomery County, Pennsylvania and *The Town and Country* of Pennsburg, Montgomery County, Pennsylvania, and owner and operator of radio station WNPV of Lansdale, Montgomery County, Pennsylvania;

The Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter; The Pennsylvania Newspaper Publishers Association; and The Pennsylvania Society of Newspaper Editors, professional associations of Pennsylvania journalists.

6. Montgomery Publishing Company is the publisher of ten newspapers distributed in Montgomery County, Pennsylvania.

witnesses and others from discussing or commenting about the cases. Petitions to Vacate the trial courts' orders, raising the identical issues as in *Philadelphia Newspapers, Inc. v. Jerome*, were filed in each action. These Petitions were denied for lack of standing. Thereafter, Petitions for Mandamus and/or Prohibition and Petitions for Assumption of Plenary Jurisdiction were filed with the Supreme Court of Pennsylvania. All Petitions were denied without opinion on June 20, 1977.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL.

I. Rules of Criminal Procedure Mandating Closed Pretrial Suppression Hearings and Impounded Court Records Based Solely on the Request of the Defendant, Without Hearing or Any Finding of a Potential for Prejudice, Violate Appellants' Fundamental Constitutional Rights.

In *Nebraska Press Assoc. v. Stuart*, 427 U. S. 539 (1976), this Court specifically left undecided issues relating to (a) the validity of the closing of pretrial proceedings with the consent of the defendant, and (b) judicially imposed restraints on lawyers and others. *Id.*, 427 U. S. at 564, n. 8. At issue here are cases in which, during a very brief period of time, three separate trial courts in important criminal prosecutions closed pretrial hearings, sealed court records and imposed broad restraining orders on attorneys and others, in reliance upon procedural rules permitting action merely upon motion of the defendant, affording no hearing to the parties excluded and foreclosed from access to the news. The courts below gave no consideration to less restrictive methods of preserving the criminal defendant's right to a fair trial, such as impaneling and sequestering a jury prior to the pretrial suppression hearing.

It is imperative for this Court to take these appeals and decide whether, and if so, when and under what circumstances pretrial proceedings in criminal cases may be closed in response to assertions of possible prejudicial publicity. Courts throughout the country, in their zealous and frequently misguided desire to protect the Sixth Amendment rights of criminal defendants, have been closing courtrooms and sealing court records with dangerously increasing frequency. The limits of a trial court's

power to deny public access to information concerning crucial stages of the criminal process must be tested, and a decision on these appeals, after full briefing and argument, is necessary for the preservation of fundamental First Amendment rights.

By denying appellants' Petitions, the Pennsylvania Supreme Court upheld the constitutionality of its own Rules which provide for the closing of suppression hearings and sealing of records at the whim of a defendant, without regard to the probability of any harm from publication and the interests of the public in open criminal judicial proceedings. Such blanket exclusion of the news media from judicial proceedings ignores the unique role of the media in reporting criminal trials and pre-trial proceedings, as recognized by this Court in *Cox Broadcasting Co. v. Cohn*, 420 U. S. 469, 491-92 (1975):

"[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice."

See also, *Sheppard v. Maxwell*, 384 U. S. 333, 349-50 (1966); *Estes v. Texas*, 381 U. S. 532, 541-42, *reh. den.* 382 U. S. 875 (1965); *Craig v. Harney*, 331 U. S. 367, 374 (1947).

It is meaningless to say that the press is free to publish truthful information about criminal proceedings when press and public can be and are denied access to the courtroom and to the official records of the proceedings therein, so that information about important judicial proceedings cannot be gathered and reported to the public at large.

Few traditions in this country have greater strength than that of the administration of justice before the public and the press. Only recently have we seen the wide assault on that tradition exemplified by the orders in these cases. The foundation for the tradition of public trials and pre-trial proceedings was succinctly described by this Court in *Re Oliver*, 333 U. S. 257, 268-270 (1948):

"The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the *lettre de cachet*. All of these institutions obviously symbolized a menace to liberty. . . . The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.'"

More recently, in *Craig v. Harney*, *supra*, 331 U. S. at 374, this Court declared:

7. Pretrial hearings are an integral part of the "trial". See *Kirby v. Illinois*, 406 U. S. 682, 689-90 (1972); *United States ex rel. Bennett v. Rundle*, 419 F. 2d 599 (3d Cir. 1969) (en banc); *United States v. Clark*, 475 F. 2d 240 (2d Cir. 1973).

"A trial is a public event. What transpires in the courtroom is public property. . . . Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it."

In an action like the *Boyle* murder retrial involving the former head of one of the nation's most powerful labor unions, or in entirely different factual contexts, as in the *Palmer* and *Phillips* cases, involving the murder of a policeman and a young girl, courts must fully investigate the potential for prejudice prior to entering orders restricting the public's access to court proceedings. In all of these actions, each with entirely different facts, the trial courts entered virtually identical orders at the mere request of the defendants. Secret or closed judicial proceedings are the antithesis of the orderly operation of our public institutions. Secrecy breeds suspicion, distrust and rumor, or, what may be worse, encourages public apathy and indifference. Public confidence in the administration of justice is directly served by judicial proceedings open to public scrutiny. Numerous courts throughout the country have held that the public has a cognizable constitutional interest in keeping trials open.⁸ The First and Sixth Amendments command that, absent extraordinary circum-

8. See, e.g., *United States ex rel. Lloyd v. Vincent*, 520 F. 2d 1272, 1274 (2d Cir.), *cert. denied* 423 U. S. 937 (1975); *Lewis v. Peyton*, 352 F. 2d 791, 792 (4th Cir. 1965); *United States v. Kobli*, 172 F. 2d 919, 924 (3d Cir. 1949); *United States v. Sorrentino*, 175 F. 2d 721, 722-23 (3d Cir.), *cert. denied* 338 U. S. 868, *reh. denied* 338 U. S. 896 (1949); *United States ex rel. Mayberry v. Yeager*, 321 F. Supp. 199, 204 (D. N. J. 1971); *Gannett Company v. Depasquale*, — N. Y. S. 2d — (New York Supreme Court, Appellate Division 1976); *Hearst v. Cholakos*, — N. Y. S. 2d — (New York Supreme Court, Appellate Division (1976)); *State ex rel. Dayton Newspapers v. Phillips*, 46 Ohio St. 2d 457, 351 N. E. 2d 127

stances, criminal proceedings be public. The criminal defendant himself has no right to compel a private trial. See *Singer v. United States*, 380 U. S. 24, 35 (1965).

The issues raised by the instant appeal are of profound national importance. When and under what circumstances the criminal process can be closed from public view is an issue of immense concern to courts throughout the country, seeking appropriate methods to insure fair and impartial trials while preserving and protecting the interests of the public at large. The Pennsylvania Rules of Criminal Procedure, which permit and indeed mandate closed proceedings at the mere request of a defendant cannot meet constitutional muster. In numerous decisions, this Court has recognized that "pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial." *Nebraska Press Assoc. v. Stuart*, *supra*, 427 U. S. at 554. See also, *Stroble v. California*, 343 U. S. 181 (1952); *Beck v. Washington*, 369 U. S. 541 (1962); *Murphy v. Florida*, 421 U. S. 794 (1975). At the very least, therefore, this Court should, after full hearing of these appeals preclude the closing of criminal proceedings unless it can be demonstrated, by the clear and convincing evidence⁹

8. (Cont'd.)

(1976); *State ex rel. Gore Newspaper Company v. Tyson*, 313 So. 2d 777 (Fla. App. 4th Dist. 1975); *Citizen Publishing Company v. Buchanan*, 22 Ariz. App. 521 (1974); *People v. Hinton*, 31 N. Y. 2d 71, 75, 334 N. Y. S. 2d 885, 286 N. E. 2d 265 (1972), *cert. denied* 410 U. S. 911 (1973); *Oliver v. Postel*, 30 N. Y. 2d 171, 331 N. Y. S. 2d 207 (1972); *Phoenix Newspapers, Inc. v. Jennings*, 107 Ariz. 557, 490 P. 2d 563 (1971); *Oxnard Publishing Co. v. Superior Court*, 68 Cal. Rptr. 83 (Ct. App. 1968); *Phoenix Newspapers, Inc. v. Superior Court*, 101 Ariz. 257, 418 P. 2d 594 (en banc 1966); *E. W. Scripps Co. v. Fulton*, 100 Ohio App. 157, 125 N. E. 2d 896 (1955), *appeal dismissed as moot*, 164 Ohio 261, 130 N. E. 2d 701 (Sup. Ct. 1955); *Kirtowsty v. Superior Court*, 143 Cal. Rptr. 2d 745, 300 P. 2d 163 (Ct. App. 1956).

9. This Court has adopted the "clear and convincing evidence" standard in other contexts involving protection of First Amendment

necessary to overcome the heavy presumption against constitutional validity¹⁰ of any order restricting publication of information ordinarily in the public domain, that (a) the nature and extent of pretrial publicity creates a clear and immediate threat to the fairness of the trial; and (b) no other available measures will be adequate to preserve defendant's right to a fair trial.

The public's fundamental right to be informed of the criminal process is thus involved in this case. In view of the sweeping effect of the Pennsylvania Rules of Criminal Procedure here challenged, which place a mantle of secrecy around integral portions of criminal trials, it is of the utmost importance that this Court take and decide this case. Further, in view of the nationwide dilemma faced by trial courts in dealing with prejudicial publicity and efforts of defense counsel to foreclose public proceedings, it is imperative for the court to hear and decide this appeal, and to establish guidelines for the co-existence of the rights and interests of criminal defendants and those of the public at large.

II. As Applied, The Pennsylvania Rules of Criminal Procedure Amount to a Prior Restraint on Free Speech and Press by Precluding all Access to Information About Pending Criminal Trials.

Although no order was entered by the trial courts directly enjoining publication by the news media, all possible sources of information concerning the cases were

9. (Cont'd.)

freedoms. See, *Gertz v. Robert Welch, Inc.*, 418 U. S. 323, 342 (1974); *New York Times Co. v. Sullivan*, 376 U. S. 254, 285-86 (1964).

10. *Times-Picayune Publishing Corp. v. Schulingkamp*, 419 U. S. 1301, 1307 (1974) (In Chambers Opinion of Powell, J.); *New York Times Co. v. United States*, 403 U. S. 713, 714 (1971).

effectively closed to them. Such a pervasive denial of access to news about criminal proceedings constitutes, in effect, a prior restraint upon freedom of expression. Freedom of the press, if it is to mean anything, must include the right to publish contemporaneous accounts of criminal proceedings. That right is lost when, as in the cases now on appeal, the ability to publish is lost due to a total inability to gain information.

Long ago James Madison wrote, "A popular government, without popular information *or the means of acquiring it*, is but a prologue to a farce or a tragedy; or perhaps both." 9 *Writings of James Madison* 103 (G. Hurst ed. 1910) (emphasis added). See also, Micklejohn, *Free Speech and Its Relation to Self-Government*, at 39 (1948).

This Court has repeatedly emphasized that news-gathering and the right to receive information are protected by the First Amendment for: "without some protection for seeking out the news, freedom of the press could be eviscerated". *Branzburg v. Hayes*, 408 U. S. 665, 681, 707 (1972). See also, *Red Lion Broadcasting Co. v. FCC*, 395 U. S. 367, 390 (1969); *Stanley v. Georgia*, 394 U. S. 557, 564 (1969); *Lamont v. Postmaster General*, 381 U. S. 321 (1965). The restrictions imposed by the trial courts' orders effectively denied appellants access to any information concerning the pending criminal proceedings—the courtroom was closed, all records, motions and papers filed were sealed and impounded, and all persons having any connection with the case were prohibited from disclosing any information. This cloak of secrecy was and is so extensive as to conceal from the public even the date on which trial is scheduled to commence.

The impounding of all records made of a pretrial suppression hearing is mandated by Pennsylvania Rule of

Criminal Procedure 323(g). The Pennsylvania Supreme Court has approved the impounding of all records in a celebrated criminal proceeding at the mere request of the defendant without benefit of any hearing for the parties directly affected by the rulings.¹¹

By contrast to the Pennsylvania courts, the Court of Appeals for the Fourth Circuit, in reviewing an order impounding papers filed in the criminal proceedings against Governor Mandel, has held the impoundment order to be "an unnecessary prior restraint on freedom of the press," and issued a writ of mandamus vacating the impoundment order. *In Re Washington Post Company, et al.*, United States Court of Appeals for the Fourth Circuit, No. 76-1695, Writ of Mandamus issued July 19, 1976. See also, *Forcade v. Knight*, 416 F. Supp. 1025 (D. D. C. 1976); *Westinghouse Broadcasting Company, Inc. v. Dukakis*, 409 F. Supp. 895 (D. Mass. 1976); *In Re Midwest Milk Monopolization Litigation*, 405 F. Supp. 118 (W. D. Mo. 1975); *Borreca v. Fasi*, 369 F. Supp. 906 (D. Haw. 1974); *Charlottesville Newspapers, Inc. v. Berry*, 215 Va. 116, 206 S. E. 2d 267 (1974).

Furthermore, the all-inclusive prohibition on dissemination of information concerning the trial or pre-trial proceedings constitutes a prior restraint. In *CBS, Inc. v. Young*, 522 F. 2d 234, 240 (6th Cir. 1975), an order prohibiting those involved in a highly publicized criminal case from discussing the case with any member of the press or public was held to be "an extreme example of a prior restraint upon freedom of speech and expression" See also, *Chicago Council of Lawyers v. Bower*, 522 F. 2d 242 (7th Cir. 1975).

11. In *Boyle*, all records in the action, including but not limited to records of the suppression hearing, were sealed at the request of defendant.

The orders entered by the trial courts denied any access to information concerning the pending criminal trials. The orders and the Pennsylvania Rules pursuant to which they were issued are clearly intended to restrict the flow of information, as distinguished from the restrictions upheld in *Pell v. Procunier*, 417 U. S. 817 (1974) and *Saxbe v. The Washington Post Co.*, 417 U. S. 843 (1974). Unquestionably, a trial court has the power to enter appropriate protective orders where necessary to avoid a clear and imminent threat to the administration of justice and to preserve the defendant's right to a fair trial. Where, as here, however, the orders are tantamount to the imposition of a prior restraint, denying any access to and thus precluding publication of any information concerning the criminal trials, their entry must at the very least be supported by the same standards necessary to support any prior restraint. See *Nebraska Press Assoc. v. Stuart*, *supra*. Moreover, the Pennsylvania Rules of Criminal Procedure here challenged permit the entry of such orders without so much as a hearing, let alone the showing necessary to overcome the heavy presumption of invalidity. Accordingly, it is essential for this Court to declare the invalidity of the Pennsylvania Rules of Criminal Procedure which as applied to these proceedings permit the imposition of unnecessary prior restraints on publication without affording the slightest measure of procedural due process to those restrained.

It seems impossible to overstate the importance of the issues raised by the imposition of sweeping restrictive orders without any showing as to their necessity or validity. The Pennsylvania Supreme Court has permitted the envelopment in total secrecy of significant judicial proceedings, drastically curtailing the constitutional rights of the press and public in the name of a "fair trial".

CONCLUSION.

Based upon the foregoing arguments and authorities it is requested that that Court note jurisdiction in this appeal, receive full briefs on the merits, and hear oral arguments in order to resolve the substantial federal questions here involved.

Respectfully submitted,

Of Counsel:

ARTHUR E. NEWBOLD, IV,
DECHERT, PRICE & RHODES,
3400 Centre Square West,
1500 Market Street,
Philadelphia, Pennsylvania.
19102

ROBERTA S. STAATS,
MORGAN, LEWIS & BOCKIUS,
The Fidelity Building,
123 South Broad Street,
Philadelphia, Pennsylvania.
19109

DAVID H. MARION,
SAMUEL E. KLEIN,
KOHEN, SAVETT, MARION
& GRAF, P. C.,
1214 IVB Building,
1700 Market Street,
Philadelphia, Pennsylvania.
19103
(215) 665-990

Attorneys for Appellants

EXHIBIT 1

**SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT**

SALLY MRVOS
Prothonotary
LAURA E. LITCHARD
Deputy Prothonotary

Philadelphia, 19107

May 25, 1977

David H. Marion, Esq.
Kohn, Savett, Marion & Graf
1214 IVB Building
1700 Market Street
Philadelphia, Penna. 19103

Re: Philadelphia Newspapers, Inc., et al., Petitioners
v. Honorable Domenic D. Jerome, No. 384,
Miscellaneous Docket No. 21 -

Dear Mr. Marion:

This is to advise that the following Order has been
endorsed on both the Petition for Writ of Mandamus and
Prohibition and the Petition for Plenary Jurisdiction, filed
in the above captioned matter:

"May 23, 1977.

Denied.

s/ By the Court."

Very truly yours,

/s/ SALLY MRVOS, cl
Prothonotary

SM/c

cc: Hon. Domenic D. Jerome
Jonathan Vipond, III, Esq.
Richard A. Sprague, Esq.
A. Charles Peruto, Esq.

EXHIBIT 2

RECEIVED JUNE 23, 1977

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICTSALLY MRVOS
Prothonotary
LAURA E. LITCHARD
Deputy Prothonotary

Philadelphia, 19107

June 22, 1977

Arthur E. Newbold, IV, Esquire
Dechert, Price & Rhoads
3400 Centre Square West
Philadelphia, Pennsylvania 19102Re: Equitable Publishing Company, Inc., et al.,
Petitioners, v. The Honorable Robert W.
Honeyman, etc., No. 399 Miscellaneous
Docket No. 21

Dear Mr. Newbold:

The Court has entered the following Order on the
Petition for Assumption of Plenary Jurisdiction and on
the Petition for Writ of Mandamus and Prohibition filed
in the above-captioned matter:

June 20, 1977

Denied.

By the Court

Very truly yours,
SALLY MRVOS
ProthonotaryBy /s/ LAURA E. LITCHARD
Laura E. Litchard
Deputy Prothonotary

LEL:cl

cc: Ross Weiss, Esquire
Vincent J. Fumo, Esquire
Jonathan Vipond, III, Esquire**EXHIBIT 3**SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICTSALLY MRVOS
Prothonotary
LAURA E. LITCHARD
Deputy Prothonotary

Philadelphia, 19107

June 23, 1977

Roberta S. Staats, Esquire
Morgan, Lewis & Bockius
123 South Broad Street
Philadelphia, Pa. 19109Re: Montgomery Publishing Company, Petitioner,
v. The Honorable Robert W. Honeyman, etc.,
No. 400 Miscellaneous Docket No. 21

Dear Ms. Staats:

The Court has entered the following Order on the
Petition for Review in the Nature of Prohibition filed in
the above-captioned matter:

June 20, 1977

Denied.

By the Court

Very truly yours,
SALLY MRVOS
ProthonotaryBy: /s/ LAURA E. LITCHARD
Laura E. Litchard
Deputy Prothonotary

LEL:cl

cc: Ross Weiss, Esquire
Vincent J. Fumo, Esquire
Jonathan Vipond, III, Esquire

EXHIBIT 4

RECEIVED JUNE 24, 1977

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICTSALLY MRVOS
Prothonotary
LAURA E. LITCHARD
Deputy Prothonotary

Philadelphia, 19107

June 23, 1977

Arthur E. Newbold, IV, Esquire
Dechert, Price & Rhoads
3400 Centre Square West
1500 Market Street
Philadelphia, Pa. 19102Re: Equitable Publishing Company, Inc., et al.,
Petitioners, v. The Honorable Lawrence A.
Brown, etc.—No. 406 Miscellaneous Docket
No. 21

Dear Mr. Newbold:

The Court has entered the following Order on both
the Petition for Assumption of Plenary Jurisdiction and
the Petition for Writ of Mandamus and Prohibition filed
in the above-captioned matter:

June 20, 1977

Denied.

By the Court

Very truly yours,
SALLY MRVOS
ProthonotaryBy /s/ LAURA E. LITCHARD
Laura E. Litchard
Deputy Prothonotary

LEL:cl

cc: Hon. Robert P. Kane
Joseph L. Santaguida, Esquire
William T. Nicholas, Esquire
Jonathan Vipond, III, Esquire**EXHIBIT 5**SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICTSALLY MRVOS
Prothonotary
LAURA E. LITCHARD
Deputy Prothonotary

Philadelphia, 19107

June 23, 1977

Roberta S. Staats, Esquire
Morgan, Lewis & Bockius
123 South Broad Street
Philadelphia, Pa. 19109Re: Montgomery Publishing Company, Petitioner,
v. The Honorable Lawrence A. Brown, etc.
No. 407 Miscellaneous Docket No. 21

Dear Ms. Staats:

The Court has entered the following Order on both
the Application Requesting That This Court Assume
Plenary Jurisdiction and on the Petition for Review in the
Nature of Prohibition filed in the above-captioned matter:

June 20, 1977

Denied.

By the Court

Very truly yours,
SALLY MRVOS
ProthonotaryBy: /s/ LAURA E. LITCHARD
Laura E. Litchard
Deputy Prothonotary

LEL:cl

cc: William T. Nicholas, Esquire
Joseph C. Santaguida, Esquire
Jonathan Vipond, III, Esquire

EXHIBIT 6

Date filed: August 5, 1977

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 384 Miscellaneous Docket No. 21

PHILADELPHIA NEWSPAPERS, INC., et al.,
Petitioners

v.

THE HONORABLE DOMENIC D. JEROME, Judge of
the Court of Common Pleas of Delaware County,
Respondent

NOTICE OF APPEAL

Notice is hereby given that Philadelphia Newspapers, Inc., The Associated Press, Central States Publishing, Inc., The Pennsylvania Newspaper Publishers Association, The Pennsylvania Society of Newspaper Editors, and Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter, Petitioners above named, hereby

appeal pursuant to 28 U. S. C. § 1257(2) to the Supreme Court of the United States from the Judgment and Order of this Court, dated May 23, 1977, denying the Petition for Writ of Mandamus and Prohibition.

/s/ SAMUEL E. KLEIN
DAVID H. MARION
SAMUEL E. KLEIN
KOHN, SAVETT, MARION
& GRAF, P. C.
1214 IVB Building
1700 Market Street
Philadelphia, Pennsylvania
19103
(215) 665-9900
*Attorneys for Petitioners-
Appellants*

Dated: August 5, 1977

EXHIBIT 7

Date Filed: August 5, 1977

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 399 Miscellaneous Docket No. 21

EQUITABLE PUBLISHING COMPANY, INC., et al.,
Petitioners

v.

THE HONORABLE ROBERT W. HONEYMAN, Judge
of the Court of Common Pleas of Montgomery County,
Respondent

NOTICE OF APPEAL

Notice is hereby given that Equitable Publishing Company, Inc., The Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter, The Pennsylvania Newspaper Publishers' Association, and The Pennsylvania Society of Newspaper Editors, Petitioners above named, hereby appeal pursuant to 28 U. S. C. § 1257(2) to the Supreme Court of the United States from the Judgment and Order of this Court, dated June 20,

1977, denying the Petition for Writ of Mandamus and Prohibition.

/s/ SAMUEL E. KLEIN
DAVID H. MARION
SAMUEL E. KLEIN
KOHN, SAVETT, MARION
& GRAF, P. C.
1214 IVB Building
1700 Market Street
Philadelphia, Pennsylvania
19103
(215) 665-9900
*Attorneys for Petitioners-
Appellants*

Dated: August 5, 1977

EXHIBIT 8

Date Filed: August 5, 1977

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 400 Miscellaneous Docket No. 21

MONTGOMERY PUBLISHING COMPANY,
Petitioner

v.

THE HONORABLE ROBERT W. HONEYMAN, Judge
of the Court of Common Pleas of Montgomery County,
Respondent

NOTICE OF APPEAL

Notice is hereby given that Montgomery Publishing Company, Petitioner above named, hereby appeals pursuant to 28 U. S. C. § 1257(2) to the Supreme Court of the United States from the Judgment and Order of this

Court, dated June 20, 1977, denying the Petition for Writ of Mandamus and Prohibition.

/s/ SAMUEL E. KLEIN
DAVID H. MARION
SAMUEL E. KLEIN
KOHN, SAVETT, MARION
& GRAF, P. C.
1214 IVB Building
1700 Market Street
Philadelphia, Pennsylvania
19103
(215) 665-9900

*Attorneys for Petitioner-
Appellant*

Dated: August 5, 1977

EXHIBIT 9

Date filed: August 5, 1977

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 406 Miscellaneous Docket No. 21

EQUITABLE PUBLISHING COMPANY, INC., et al.,
Petitioners

v.

THE HONORABLE LAWRENCE A. BROWN, Judge of
the Court of Common Pleas of Montgomery County,
Respondent

NOTICE OF APPEAL

Notice is hereby given that Equitable Publishing Company, Inc., The Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter, The Pennsylvania Newspaper Publishers' Association and The Pennsylvania Society of Newspaper Editors, Petitioners above named, hereby appeal pursuant to 28 U. S. C. § 1257(2) to the Supreme Court of the United States from

the Judgment and Order of this Court, dated June 20, 1977, denying the Petition for Writ of Mandamus and Prohibition.

/s/ SAMUEL E. KLEIN
DAVID H. MARION
SAMUEL E. KLEIN
KOHN, SAVETT, MARION
& GRAF, P. C.
1214 IVB Building
1700 Market Street
Philadelphia, Pennsylvania
19103
(215) 665-9900
*Attorneys for Petitioners-
Appellants*

Dated: August 5, 1977

EXHIBIT 10

DATE FILED August 5, 1977
 IN THE
 SUPREME COURT OF PENNSYLVANIA
 EASTERN DISTRICT

No. 407 Miscellaneous Docket No. 21

MONTGOMERY PUBLISHING COMPANY,
Petitioner

v.

THE HONORABLE LAWRENCE A. BROWN, Judge of
 the Court of Common Pleas of Montgomery County,
Respondent

NOTICE OF APPEAL

Notice is hereby given that Montgomery Publishing Company, Petitioner above named, hereby appeals pursuant to 28 U. S. C. § 1257(2) to the Supreme Court of the United States from the Judgment and Order of this

Court, dated June 20, 1977, denying the Petition for Writ of Mandamus and Prohibition.

/s/ SAMUEL E. KLEIN
 DAVID H. MARION
 SAMUEL E. KLEIN
 KOHN, SAVETT, MARION
 & GRAF, P. C.
 1214 IVB Building
 1700 Market Street
 Philadelphia, Pennsylvania
 19103
 (215) 665-9900

*Attorneys for Petitioner-
 Appellant*

Dated: August 5, 1977

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U. S.
FILED
NOV 22 1977
MICHAEL RODAK, JR., CLERK

October Term, 1977

No. 77-308

Philadelphia Newspapers, Inc., The Associated Press, Central States Publishing, Inc., The Pennsylvania Newspaper Publishers Association, The Pennsylvania Society of Newspaper Editors, and the Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter, *Appellants*

v.

The Honorable Domenic D. Jerome, Judge of the Court of Common Pleas of Delaware County, Pennsylvania; And Equitable Publishing Company, Inc., The Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter, The Pennsylvania Newspaper Publishers Association and The Pennsylvania Society of Newspaper Editors, *Appellants*

v.

The Honorable Lawrence A. Brown, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania; And Montgomery Publishing Company, *Appellant*

v.

The Honorable Lawrence A. Brown, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania; And Equitable Publishing Company, Inc., The Society of Professional Journalists, Sigma Delta Chi, Greater Philadelphia Chapter, The Pennsylvania Newspaper Publishers Association, and The Pennsylvania Society of Newspaper Editors, *Appellants*

v.

The Honorable Robert W. Honeyman, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania; and Montgomery Publishing Company, *Appellant*

v.

The Honorable Robert W. Honeyman, Judge of the Court of Common Pleas of Montgomery County, Pennsylvania

MOTION TO DISMISS

Appeal From the Judgments of the Supreme Court of Pennsylvania

Of Counsel:

JONATHAN VIPOND, III

EVE L. CUTLER

1414 Three Penn Center Plaza
Philadelphia, Pa. 19102

RALPH S. SPRITZER

PAUL BENDER

3400 Chestnut Street
Philadelphia, Pa. 19104
Attorneys for Appellees

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Pursuant to Rule 16 of this Court's rules, appellees move that the appeals from the judgments of the Supreme Court of Pennsylvania denying appellants' petitions for writ of mandamus and prohibition be dismissed for want of a substantial federal question.

STATEMENT

Although the consolidated appeals docketed by appellants (all of whom are members of the press) arise out of three separate criminal proceedings to which appellants sought access, the issues in all three cases are the same. In each instance, a criminal defendant had been indicted for murder and was awaiting trial or retrial.¹ All of the cases were notorious and the crimes charged had been the subject of extensive coverage in the news media.² In each case, pretrial motions were filed by the respective defendants seeking the suppression of evidence alleged to have been unconstitutionally obtained, and each defendant further moved, pursuant to the Pennsylvania Rules of Criminal Procedure,³ that the proceedings be held *in*

1. The defendant in the Delaware County case, W.A. "Tony" Boyle, had been previously tried and the conviction set aside on appeal.

2. The Boyle case is described by appellants as involving a charge of an "execution-style" murder, and the extensive publicity it generated had led to a change of venue. The two Montgomery County cases involved, respectively, the murder of a policeman and of a young girl. The Montgomery County cases have now been tried. The Boyle case is still awaiting retrial.

3. The relevant Rules are set forth in the Jurisdictional Statement. Rule 323 (f) and (g) authorize the trial judge, on motion of the defendant, to exclude spectators and to impound the hearing record until such time as it is determined that the interests of justice require disclosure. Rule 326 authorizes the court, acting on its own motion or motion of either party, to issue a special order in a widely-publicized or sensational case "governing such matters as extra-judicial statements by parties and witnesses likely to interfere with the rights of the accused to a fair trial by an impartial jury. . . ."

camera and that confidentiality be maintained pending further order of the court. The respective trial judges issued orders providing for closure of the hearings, impoundment of the hearing records and the maintenance of confidentiality by those involved in the proceedings. Appellants subsequently moved to vacate the orders of the trial judges and to open the then-pending suppression hearings to the press. Following denial of their motions, appellants unsuccessfully sought relief in the Supreme Court of Pennsylvania. This appeal challenges the orders of that court on the ground that the pertinent State Rules of Criminal Procedure violate the First and Sixth Amendments of the Constitution as made applicable to the States by the Fourteenth.

The Questions Are Not Substantial

In support of the judgments below, we submit, *first*, that Pennsylvania's authorization of protective orders to avoid pretrial disclosure of incriminating matter that a defendant has a constitutional right to suppress is a reasonable and appropriate measure of the kind that this Court has approved; *secondly*, that the Sixth Amendment guarantee that "*the accused* shall enjoy the right to a speedy and public trial" provides no basis for holding that members of the press can compel the State to conduct in public a pretrial proceeding that it has undertaken to conduct *in camera* at the instance of the accused; and, *thirdly*, that, although the press has broad freedom to publish, free from governmental interference, such information as it has independently obtained, it has no First Amendment right to require the Government to conduct governmental business or proceedings in a manner that will furnish it with news.

1. In *Sheppard v. Maxwell*, 384 U.S. 333 (1966), this Court felt obligated to set aside a state court conviction for murder because of the likelihood that the defendant's con-

stitutional right to a fair trial had been impaired by pretrial newspaper publicity. The "cure," it said, "lies in those remedial measures that will prevent the prejudice at its inception. The courts must take steps by rule and regulation that will protect their processes from prejudicial outside interferences." *Id.* at 363.⁴ Only last Term, citing the *Sheppard* case, the Court restated its conviction that trial judges must employ such measures before prejudicial information enters the public domain. *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539 (1976). The Chief Justice's opinion for the Court pointed out that "[p]rofessional studies have filled out these [Sheppard] suggestions, recommending that trial courts in appropriate cases limit what the contending lawyers, the police and witnesses may say to anyone." *Id.* at 564. The opinion notes further (*id.*, n.8), "closing of pretrial proceedings with the consent of the defendant when required is also recommended in guidelines that have emerged from various studies." The separate opinion of Mr. Justice Brennan likewise observes that "judges may stem much of the flow of prejudicial publicity at its source, before it is obtained by representatives of the press" (*id.* at 601).⁵

We do not suggest that this Court has had occasion to examine the particular rules here challenged. We do stress that it has not merely invited, but has held it to be the duty of, trial judges to adopt appropriate measures to

4. The *Sheppard* Court went on to state (*ibid.*):

Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.

5. His opinion also notes (*id.* at 587) that "[n]o one can seriously doubt . . . that unmediated prejudicial pretrial publicity may destroy the fairness of a criminal trial. . . ."

safeguard the defendant's right to an impartial jury and a fair trial. The rules here in question, as we shall point out, follow closely the considered suggestions made in professional studies and are appropriately tailored to a critical need.

The American Bar Association Project on Minimum Standards for Criminal Justice has addressed the question of excluding the public, *inter alia*, from hearings on motions to suppress evidence on the ground that the evidence will be inadmissible at trial and is therefore likely to interfere with the right of fair trial. Its proposed rule states:

Motion to exclude public from all or part of pretrial hearing.

In any preliminary hearing, bail hearing, or other pretrial hearing in a criminal case, including a motion to suppress evidence, the defendant may move that all or part of the hearing be held in chambers or otherwise closed to the public, including representatives of the news media, on the ground that dissemination of evidence or argument adduced at the hearing may disclose matters that will be inadmissible in evidence at the trial and is therefore likely to interfere with his right to a fair trial by an impartial jury. The motion shall be granted unless the presiding officer determines that there is no substantial likelihood of such interference. With the consent of the defendant, the presiding officer may take such action on his own motion or at the suggestion of the prosecution. Whenever under this rule all or part of any pretrial hearing is held in chambers or otherwise closed to the public, a complete record of the proceedings shall be kept and shall be made available to the public following the completion of trial or disposition of the case without trial. Nothing in this rule is intended to interfere with the power of the presiding officer in any pretrial hearing to caution those present that dissemi-

nation of certain information by any means of public communication may jeopardize the right to a fair trial by an impartial jury.⁶

Rule 323 of the Pennsylvania Rules (J.S. 3-5) follows substantially the same approach, but is narrower in its coverage in that it authorizes closure only in the case of a pretrial motion to suppress evidence alleged to have been obtained in violation of a defendant's constitutional rights.⁷

In addition to their action closing the suppression hearings and sealing the hearing records, the trial judges here ordered, pursuant to Rule 326, that the personnel involved refrain from making extrajudicial statements concerning the pending proceedings. Rule 326 is the precise counterpart of a proposed rule ("Provisions for Special Orders in Widely Publicized and Sensational Cases") recommended by a Judicial Conference committee for adoption by United States District Courts.⁸

The reasons for a rule like Pennsylvania's Rule 323 are compelling. In the first place, the Rule is confined to motions to suppress unconstitutionally obtained evidence. When such a motion, sufficient on its face, is filed, it becomes apparent that the defendant is seeking the suppression or return of evidence which, if his allegations prove true, should never have come into the hands of the authorities in the first place. In short, the very function of the motion to suppress is to vindicate the protected rights of privacy and of freedom from testimonial compulsion. If the motion is well-founded, it surely is reason-

6. American Bar Association, Standards Relating to Fair Trial and Free Press, Approved Draft, p.7 (1968).

7. Also, such action may be taken only when the defendant moves for closure.

8. See Committee on the Operation of the Jury System, Report on the "Free Press—Fair Trial" Issue, 45 F.R.D. 391, 409 (1968). The committee was chaired by Chief Judge Irving R. Kaufman of the Second Circuit and consisted of twelve federal judges.

able to restore, so far as possible, the *status quo ante*. If the claim of constitutional violation is not proved and the motion to suppress is denied, the evidence of course becomes available for use at the public trial of the defendant.

Secondly, there can be no doubt that the subject matter of a non-frivolous motion to suppress—whether it relates to a confession, to contraband or to other incriminatory matter—is apt to be highly prejudicial. Since the full extent of its prejudicial character may be unclear before the facts and issues are fully developed at the trial itself, there is need for a prophylactic rule when the defendant makes a sufficient allegation of the need for interim protection. The considerations that require a court to hear a motion to suppress outside the presence of an impaneled jury (see *Jackson v. Denno*, 378 U.S. 368 (1964); F.R. Crim. Pro., Rule 41(e)) likewise justify the conduct of such a pretrial hearing outside the presence of the community of potential jurors.⁹ This is particularly true where, as here, the crimes that are the subject of the indictments are sensational and have been widely publicized.

So far as the application of Rule 326 is concerned, it suffices to point out that in *Sheppard v. Maxwell*, this Court specifically held it to be the duty of the trial judge, in a notorious case, to “control the release of leads, information and gossip to the press by police officers, witnesses and counsel for both sides” (384 U.S. at 359). In the instant cases, it would have been a futility to close the suppression hearings while leaving the parties, witnesses,

9. Appellants make the remarkable suggestion that the courts below failed to consider the less restrictive alternative “of preserving the criminal defendant’s right to a fair trial” by “impaneling and sequestering [the] jury prior to the pretrial suppression hearing” (J.S. 12). Suppression hearings typically occur weeks or months before trial. In the Boyle case, the order of closure was entered on May 2, 1977, and trial is scheduled to take place in January, 1978.

counsel and court personnel free to issue extrajudicial statements.¹⁰

2. Appellants’ reliance upon the Sixth Amendment¹¹ finds no support in decisions of this Court and would require a strained construction of its provisions—*first*, because the reference to a “speedy and public trial” does not embrace pretrial proceedings, and, *secondly*, because the rights guaranteed by the Amendment run to “the accused.”

(a) The only decision of this Court cited by appellants for the proposition that the “public trial” provision of the Sixth Amendment applies to pretrial proceedings is *Kirby v. Illinois*, 406 U.S. 682 (1972). *Kirby*, however, implies nothing of the kind. It holds simply that the *right to counsel* attaches “at or after the initiation of adversary judicial criminal proceedings” (*id.* at 689). That, of course, follows from the specific guarantee of the Amendment assuring defendants the assistance of counsel in “all criminal prosecutions.” It nowise detracts from the view, long accepted by this Court, that the trial itself commences with the process of selecting the petit jury. See, *e.g.*, *Hopt*

10. It is unnecessary for this Court to consider whether the arbitrary closure of judicial proceedings, even of a pretrial nature, would admit of a remedy. It cannot be assumed that in such a case the Supreme Court of Pennsylvania would fail to exercise its supervisory powers. In all events, it cannot be denied that the crimes here involved were sensational and that public exposure of the efforts of the defendants to suppress evidence alleged to have been unconstitutionally obtained carried a latent threat of prejudice to the conduct of a fair trial.

11. “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”

v. Utah, 110 U.S. 574 (1884); *Shields v. United States*, 372 U.S. 583 (1963); cf. F.R. Crim. Pro., Rule 43 (Presence of the Defendant).¹²

The facts of the two lower court cases upon which appellants rely (J.S. 14) are far removed from the case at bar. In *United States ex rel. Bennett v. Rundle*, 419 F.2d 599 (3d Cir. 1969), the court found that the defendant's rights had been violated where the public was excluded from a suppression hearing held *after* the commencement of trial, where "there was no need to exclude the public" (*id.* at 607) because the jury had retired from the courtroom and was under an order of sequestration, and where the defendant had objected to closing of the courtroom. In these circumstances, the court concluded (*id.* at 608), the exclusion could not be "justified by any necessity to protect the defendant . . ."

United States v. Clark, 475 F.2d 240 (2d Cir. 1973), was an appeal from a narcotics conviction. Prior to trial, the defendant moved to suppress drugs seized from him as he was attempting to board an aircraft. The government thereupon moved to exclude defendant Clark and the public from the hearing on the ground that the proceedings might disclose the precautions used by the authorities to identify potential skyjackers. The motion was granted and the entire proceedings were held *in camera*, although only a "minute portion of the hearing testimony" (*id.* at 246) related to matters within the realm of security. Finding that Clark had not waived his right to be present and that his exclusion deprived him of the right of confrontation, the right to assist his counsel and the right to public trial, the court set aside the conviction. Whatever comfort appellants might derive from the court's view that "the right to public trial should extend to suppression hearings" (*id.* at 247) is immediately dispelled by the court's emphatic statement that the right is "his [the accused's]

12. See, also, *United States v. Sorrentino*, 175 F.2d 721 (3d Cir. 1949).

right" (*id.* at 246, emphasis in original), rather than a right of the public.

(b) As noted above, the constitutional command is that "*the accused shall enjoy the right to a speedy and public trial.*" This provision is exclusively for the protection of the defendant; it confers no legally enforceable rights upon the press. Appellants do not cite—nor has research uncovered—any case in which anyone other than the defendant has been held entitled to invoke the Sixth Amendment's public trial guarantee. Rather, "[t]he Sixth Amendment right to a public trial is a right of the accused, and of the accused only." *Geise v. United States*, 265 F.2d 659, 660 (9th Cir. 1959), *cert. denied*, 361 U.S. 842 (emphasis added). See also *United States v. Eisner*, 533 F.2d 987, 993-994 (6th Cir. 1976); *Weissman v. United States*, 387 F.2d 271 (10th Cir. 1967); *United States ex rel. Mayberry v. Yeager*, 321 F. Supp. 199 (D.N.J. 1971) ("Public trial is essentially a right of the accused.").

This Court considered the public trial guarantee of the Sixth Amendment in *In Re Oliver*, 333 U.S. 257 (1948). It referred there to "[t]his nation's accepted practice of guaranteeing a public trial to an accused," *id.* at 266 (emphasis added) and then set forth with approval the "frequently quoted" statement in 1 Cooley, *Constitutional Limitations* (8th ed. 1927) at 647 (emphasis added):

The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.

Since the Sixth Amendment right is that of the accused, numerous cases uphold the defendant's decision to waive his right when he concludes that publicity would harm, rather than support, his legitimate interests. *E.g.*, *United States v. Sorrentino*, 175 F.2d 721 (3d Cir. 1949).

The court in *Sorrentino* recognized that, while Sixth Amendment rights "are in a broad sense for the protection of the public generally they are in a very special sense privileges accorded to the individual member of the public who has been accused of crime." Thus "a defendant may well conclude that in his particular situation his interests will be better served by foregoing the privilege than by exercising it. . . . To deny the right of waiver in such a situation would be 'to convert a privilege into an imperative requirement' to the disadvantage of the accused." *Id.* at 722-723. With regard to the particular controversy in this case—that of the news media seeking to invoke the Sixth Amendment to defeat the interest of the accused—see Judge Fuld's thoughtful opinion for the New York Court of Appeals in *United Press Association v. Valente*, 308 N.Y. 71, 80, 123 N.E. 2d 777, 780 (1954):

The public does unquestionably have an interest in seeing that every person accused of crime shall have a fair trial and not [be] denied any of the guarantees designed for his protection. That is true, not only of the guarantee of a public trial, but also of other privileges equally basic. . . . [However,] [I]t is for the defendant alone to determine whether, and to what extent, he shall avail himself of them. To permit outsiders to interfere with the defendant's own conduct of his defense . . . could well redound to the defendant's exceeding prejudice. . . .

Actually, petitioners [the media] are seeking to convert what is essentially the right of the particular accused into a privilege for every citizen, a privilege which the latter may invoke independently of, and even in hostility to, the rights of the accused. A moment's reflection is enough, we suggest, to demonstrate that that cannot be, for it would deprive an accused of all power to waive *his* right to a public trial and thereby prevent him from taking a course

which he may believe best for his own interests." (emphasis in original)¹³

(c) Even if one were to assume, notwithstanding the explicit language of the "public trial" provision of the Sixth Amendment, that it may be extended both to pretrial proceedings and to a claim of right by a person other than the accused, it surely must be recognized, at the least, that the dominant concern of the Amendment is the protection of the accused. In a case, therefore, where the demand for publicity comes from an outsider to the proceedings and conflicts with a right of the accused specifically protected by the Sixth Amendment—the right to trial by an impartial jury—there can be no question that the right of the defendant must prevail. To hold otherwise would be to say that a "right" nowhere recognized in the

13. *Singer v. United States*, 380 U.S. 24, 34-35 (1965), cited by appellants (J.S. 16), involved neither the public trial provision of the Sixth Amendment nor the right of the media—rather than the defendant—to invoke Sixth Amendment rights. The case upheld the validity of Rule 23(a) of the Federal Rules of Criminal Procedure, which requires the government's consent for a defendant's jury-trial waiver to be effective, observing that "[t]he ability [of a defendant] to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right." By way of example, the Court noted that, "although a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial. . . ." In the context of the issues in *Singer*, this statement means at most that a State may, if it chooses, grant the prosecution the right to object to a non-public trial. *Singer* does not, however, suggest that there is any federal constitutional right of persons other than "the accused" to insist on Sixth Amendment protections; nor does it even remotely indicate that the media might have rights to interfere with trial procedures designed for the protection of litigants. The *Singer* Court emphasized that "the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result." *Id.* at 36 (emphasis added).

language of the Amendment may override the purposes unequivocally expressed.

3. Nor were appellants' First Amendment rights violated by the denial of access to the pretrial suppression hearings. Absent a showing of clear and present danger, the First Amendment prohibits a State from preventing a newspaper or broadcaster from publishing information about judicial proceedings that it has obtained for itself from public records, from attendance at public hearings, or from its own investigations. *Nebraska Press Assoc. v. Stuart, supra*; *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977); cf. *New York Times Co. v. United States*, 403 U.S. 713 (1971). Also, the Amendment presumably forbids exclusion of the press from trials or other judicial proceedings or records that are open to the general public. Cf. *Pell v. Procunier*, 417 U.S. 817, 835 (1974). The First Amendment does not, however, give the press any right to demand access to judicial proceedings that are not public in nature. As this Court made clear in *Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972),

It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. . . . [T]he press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations.

In addition to traditionally confidential grand jury proceedings, juvenile proceedings and records are often closed to the press and public, see *Cox Broadcasting Co. v. Cohn, supra* at 496, n.26; *Oklahoma Publishing Co. v. District Court, supra*, as are pretrial conferences, guilty plea negotiations, and side-bar and in-chambers discus-

sions between judge and counsel. The decision of Pennsylvania, in common with other States, to follow strong professional recommendations to close pretrial suppression hearings to the public in the interest of protecting a defendant's right of fair trial, similarly raises no First Amendment problems.

This Court has, on several occasions, recognized the fundamental difference, for First Amendment purposes, between presumptively invalid governmental restraints on the publication of information in the possession of the press, and legitimate decisions to keep some governmental proceedings and information out of the public view. In addition to *Branzburg v. Hayes, supra*, see *Pell v. Procunier, supra* at 834-35 (emphasis added):

The First and Fourteenth Amendments bar government from interfering in any way with a free press. *The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally.* It is one thing to say that a journalist is free to seek out sources of information not available to members of the general public . . . and that government cannot restrain the publication of news emanating from such sources It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally. That proposition finds no support in the words of the Constitution or in any decision of this Court.

See also *Zemel v. Rusk*, 381 U.S. 1, 17 (1965): "The right to speak and publish does not carry with it the unrestrained right to gather information."

The two cases principally relied upon by appellants in support of their First Amendment claim also recognize the distinction in the specific context of judicial proceedings. In *Cox Broadcasting Corp. v. Cohn, supra*, the Court

held that a state could not create a tort action for invasion of privacy based on the publication of information obtained from official court records open to the public: "Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it." The Court specifically observed, however, that "[i]f there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information." 420 U.S. at 496. And in *Nebraska Press Assoc. v. Stuart*, *supra*, the Court struck down "direct restraints on the press to prohibit publication" of potentially prejudicial information prior to trial, in part because less intrusive measures, such as "[c]losing of pretrial proceedings with the consent of the defendant," might have been employed. 427 U.S. at 701, n.8. Although the Court thus held in *Nebraska Press* that "once a public hearing had been held, what transpired there could not be subject to prior restraint," it expressly recognized that "closure of the preliminary hearing was an alternative open to" the trial court. See also the Court's most recent decision in this area, *Oklahoma Publishing Co. v. District Court*, *supra*. This case, which is not cited by appellants, carefully distinguishes, as do *Nebraska Press* and *Cox Broadcasting*, between the legitimate device of closing proceedings to the public and the unconstitutional effort to prevent the publication of information obtained at proceedings that were, in fact, open to the public.

The strict standards of the First Amendment are thus inapplicable to this case. That Amendment gives appellants the right, in the absence of a particularized showing of a clear and present danger, to be free from direct interference with their right to publish. It does not, however, confer a license to dictate the manner in which judicial or other governmental proceedings are conducted. "The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act." Potter Stewart, *Or of the Press*, 26 Hastings L.J. 631, 636 (1975).

CONCLUSION

For the foregoing reasons, these appeals should be dismissed for want of a substantial federal question.

Respectfully submitted,

RALPH S. SPRITZER

PAUL BENDER

Attorneys for Appellees

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